IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE NO. 38 OF 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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M/S. GENERAL CONTRACTS CO. - Applicant(s)
Versus
COMMISSIONER OF INCOME TAX - Opponent(s)

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Appearance :
MR. S.N. DIVATIA for Applicant(s).
MR. MANISH R. BHATT for Opponent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 25/08/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE R.S.GARG)

The Income Tax Appellate Tribunal, Ahmedabad Bench `B', at the instance of the Assessee, has made this

Reference on the following question for the opinion of this Court in relation to the Assessment Years 1986-87 and 1987-88 relating to the ITA No. 4129 & 4130/Ahd/90:

> *"Whether on the facts and in the circumstances of the case, the Tribunal is right in holding that the assessee is not entitled to investment allowance u/s. 32A of the I. T. Act amounting to Rs.7,87,652/- in A.Y. 1986-87 and Rs.14,37,943/- in A.Y. 1987-88?"*

2. The short facts necessary for disposal of the present Reference are that the Assessee is a partnership firm carrying on the contract work for Gujarat Mineral Development Corporation (G.M.D.C.) at Pandhro and Rajpadhi – Jagadia. The Assessee is engaged in the work of mining and excavation of lignite, including removal of overburden, at Rajpadhi and Pandhro. The Assessee claimed investment allowance of Rs.7,87,652=00 in the Assessment Year 1986-87 and Rs.14,37,943=00 in the Assessment Year 1987-88 on the total costs of the plant and machinery installed or put to use in the respective years.

2.1 The Assessing Officer, after hearing the parties, observed that the Assessee firm was engaged in carrying out the contract work of providing services and labour only therefore and as the Assessee was not himself

engaged in the business of mining and excavation, he was not entitled to investment allowance in view of the provisions of Section-32A(2)(b)(iii) of the Income Tax Act, 1961 (“the Act” for short). The Assessing Officer also observed that the earlier judgement of the Income Tax Appellate Tribunal were not decisive and according to his interpretation, the Assessee was not entitled to the investment allowance. He, accordingly, refused to grant the benefit of the investment allowance in both the years.

2.2 Being aggrieved by the order passed by the Assessing Officer, the Assessee took up the matter in appeal before the Commissioner of Income-Tax (Appeals), who, in his turn, relying upon various decisions, held that the Assessee was entitled to the claim of investment allowance and accordingly, he directed the Assessing Officer to allow the same. The Revenue, being aggrieved by the order passed by the Commissioner of Income Tax (Appeals), preferred an appeal before the Income tax Appellate Tribunal. The Revenue relied upon the judgements in the matter of ***Builders Association of India vs. Union of India***, [***209 I.T.R. 877 (S.C.)***], and ***C.I.T. vs. N.C. Budharaja and Co.***, [***204 I.T.R. 412 (S.C.)***].

2.4 The Tribunal, after considering the submissions made by the learned representatives of the parties, recorded its findings observing that the activity of removal of overburden/earth excavation work carried out by the Assessee for facilitating mining at lignite project site at Rajpardi and Pandhro was mainly a service and labour contract; the use of sophisticated plant for carrying out such works contract does not result in any manufacture or production of any article or a thing, which would be a condition precedent for grant of investment allowance. It was also held that the observations made by the Supreme Court in paragraph-5 in the matter of ***N.C. Budharaja and Co.*** (supra) were, in fact, to run against the interest of the Assessee. The Tribunal, accordingly, allowed the appeal and restored the order passed by the Assessing Officer.

3. Mr.Divetia, learned Counsel for the Assessee, submitted that from the very opening words of Section-32A and the judgement of the Supreme Court in the matter of ***Commissioner of Income-Tax vs. Sesa Goa Limited***, [***(2004) 271 I.T.R. 331***], and the Division Bench of this Court in I.T.R. No. 213 of 1991, between the ***Commissioner of Income-Tax*** and ***Sandeep Construction Pvt. Ltd.***, decided on 18th March, 2003, it would clearly appear that even if a

person is engaged or employed in removing the overburden or excavating ores, then, it would be deemed that he is engaged in an industrial activity. It is submitted that the judgement of the Supreme Court in the matter of ***N.C. Budharaja and Co.*** (*supra*) was misunderstood and misapplied by the Tribunal to the facts of the case. The learned Counsel for the Revenue on the other hand supported the order submitting, *inter alia*, that from the very language of Section-32A, it would clearly appear that the Assessee would not be entitled to any investment allowance.

4. Section-32A(2)(b)(iii) provides that machinery or plant referred to in sub-section (1) of Section-32A shall be as detailed in sub-section (2) of Section-32A. Sub.clause-(iii) of Clause-(b) provides that any new machinery or plant installed after the 31st day of March, 1976, in any other industrial undertaking for the purposes of business of construction, manufacture or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule. A fair understanding of Section-32A would make it clear that any new machinery or plant, which is installed after the 31st day of March, 1976, would be entitled to investment allowance if it is used in any other

industrial undertaking for the purposes of business of construction, manufacture or production of any article or thing.

5. In the matter of ***N. C. Budharaja and Co.*** (*supra*), the Supreme Court had observed that construction of road, dam or things like that, would not come within the sweep of manufacture or production of a thing. Their Lordships were of the opinion that production and manufacture would be something different than the construction. The case of ***N.C.Budharaja and Co.*** (*supra*) was decided on its own facts and the Supreme Court was not considering the question of plant and machinery used in the business of production or manufacture. In the said matter, once the Court came to the conclusion that construction was something different from production or manufacture, then, that was the end of the matter. The observations in the said matter were in a different context and had nothing to do with the mining activity.

6. In the unreported judgement of this Court in the matter of ***Commissioner of Income-Tax vs. Sandeep Construction*** *(supra)*, the Division Bench of this Court had observed that the finding given by the Tribunal that the assessee was engaged in mining would be a finding

based on facts of the said case, which were apparent from the relevant clause in the contract. The Division Bench, in the said matter, held that the said Assessee was entitled to the investment allowance. In that matter also, the Assessee was engaged in the activity of mining and excavating lignite.

7. The last word of the Supreme Court in the matter of mining is in the matter of ***Sesa Goa Ltd.*** (*supra*). The Supreme Court observed that extraction and processing of mineral ore would amount to `production' within the meaning of the word in Section-32A(2)(b)(iii) of the Income-Tax Act, 1961. It was also observed that investment allowance was deductible in respect of a plant installed by the Assessee after March 31, 1976, in the assessee's industrial undertaking for excavating, mining and processing mineral ore under Section-32A. The Supreme Court also observed that it would not be necessary that the mined ore must be a commercially new product for the purpose of Section-32A. There also, the question was that would the assessee be entitled to investment allowance if the plant owned by the Assessee was wholly used for the purposes of the Assessee's business under Section-32A(1) if the plant was installed after 31st March, 1976.

8. In the matter of ***Sesa Goa Ltd.*** (*supra*), the Supreme Court has taken into consideration the judgement in the matter of ***N.C. Budharaja and Co. and has quoted the following passage from the said judgement:***

> *"The word `production' has a wider connotation than the word `manufacture'. While every manufacture can be characterised as production, every production need not amount to manufacture . . . .*
> *The word `production' or `produce' when used in juxtaposition with the word `manufacture' takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all the by-products, intermediate products and residual products which emerge in the course of manufacture of goods."*

9. The opening words of Section-32A(1) are that, "in respect of a ship or an aircraft or machinery or plant specified in sub-section (2), which is owned by the assessee and is wholly used for the purposes of the business carried on by him .... ". It was never in dispute that the plant and machinery owned by the Assessee are wholly used in mining and excavation and the said activity is the active business of the Assessee. The precondition of Section-32A that the plant and machinery specified in Sub.Section-(2), which is owned by the

Assessee and is wholly used for the purposes of business, is fully satisfied. As the plant and machinery are used for the business, Section-32A(1) would apply with full force and as the plant and machinery are coming within the purview of Section-32A(2)(b)(iii), the Assessee would be entitled to the investment allowance.

10. The order passed by the Tribunal is based on misconstruction of the provisions of law. The Reference is answered in favour of the Assessee and against the Revenue. The Reference stands disposed of accordingly. No costs.

[R.S.Garg, J.]

[M. R. Shah, J.]

*kamlesh**